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No. 94-2004

FILED
JUL 7 1995
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IN THE

Supreme Court of the United States

October Term, 1994

CCC INFORMATION SERVICES, INC.,
Petitioner,

v.

MACLEAN HUNTER MARKET REPORTS, INC.,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT MACLEAN HUNTER MARKET REPORTS, INC.

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QUESTIONS PRESENTED

1. Whether, under the Copyright Act, the court of appeals properly held that expressing the value of a used vehicle does not merge with the idea of valuing used vehicles.
2. Whether the court of appeals properly held that a publication does not fall into the public domain and lose its copyright protection when the publication is merely referenced in a state regulation or statute.

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BRIEF IN OPPOSITION OF RESPONDENT MACLEAN HUNTER MARKET REPORTS, INC.

Respondent, Maclean Hunter Market Reports, Inc. ("Maclean Hunter"),[1] respectfully requests that the Court deny the petition for writ of certiorari seeking review of the Second Circuit's decision in this case. That opinion is reported as 44 F.3d 61 (2d Cir. 1994). Pet. App. 1a-32a.[2]

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[1] Respondent, Maclean Hunter Market Reports, Inc., is wholly owned by K-III Communications, a New York City publishing company. Maclean Hunter currently does business under the name of National Market Reports, Inc.

[2] "Pet. App. __" refers to pages in the Appendix submitted by the Petitioner to the Court. "Resp. App. __" refers to pages in the Appendix attached to this Brief in Opposition.

STATUTORY PROVISIONS

Pertinent portions of the United States Copyright Act, 17 U.S.C. §§ 101 - 1101, are reproduced verbatim in the Appendix.

17 U.S.C. § 101. Definitions of "derivative work" and "Literary Works" (Resp. App. 1a)

17 U.S.C. § 102. Subject matter of copyright: In general (Resp. App. 1a-2a)

17 U.S.C. § 106. Exclusive rights in copyrighted works (Resp. App. 2a)

17 U.S.C. § 501. Infringement of copyright (Resp. App. 3a)

The Connecticut Insurance Department Bulletin No. IC-10 (Dec. 10, 1992) is also produced verbatim in the Appendix. (Resp. App. 4a-5a).

STATEMENT

A. *Factual Background.*[3] Maclean Hunter and its predecessors have published the *Automobile Red Book — Official Used Car Valuations* ("Red Book") since 1911. J.A. 30; J.A. 627.[4] The Red Book guidebook is published eight times a year for three different regions (A, B and C) and the state of Wisconsin. J.A. 92; J.A. 406-408. Each edition of the Red Book has included a copyright notice and was registered with the U.S. Copyright Office previous to the time CCC first offered its used car valuation services in 1985. J.A. 511; J.A. 627.

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[3] The Statement of the Case in the petition filed by CCC Information Services, Inc. ("CCC") contains a number of factual misstatements regarding, *inter alia*, whether CCC copied original expressions of Maclean Hunter, the extent of CCC's copying, and the specific requirements of the state regulations and statutes cited by CCC. In accordance with Sup. Ct. R. 15.1, the following recitation corrects and supplements these statements.

[4] "J.A. __" refers to the Joint Appendix pages submitted by the parties to the Second Circuit.

Each Red Book contains the editors' valuations for domestic and imported "average"[5] used cars and light trucks that are seven years old or less. J.A. 90; J.A. 93; J.A. 210-211; J.A. 628.[6] Since 1983, each edition of the Red Book has stated that the valuations are "projected estimates of used vehicle values," that the Red Book does "not report actual market prices," that "as a guidebook, we project to the best of our ability vehicle values for the future period(s) covered by each [edition]" and that "[y]ou, the subscriber, must be the final judge of the actual value of a particular vehicle." J.A. 93; J.A. 627-628.

The valuations published in the Red Book are the editors' opinion and judgment of the future values of average used vehicles for a period of six weeks following the edition's publication date. The valuations and selections in the Red Book and the Older Red Book are the original creations of the Red Book editors based on the editors' many years of experience and accumulated knowledge in the field. *See, e.g.*, J.A. 73; J.A. 208-215; J.A. 227-228; J.A. 629-630 ¶ 8; J.A. 633.

Red Book editors also publish their opinions and judgments regarding car options, mileage variances,[7] and geographical differences. The reader can use these figures to make closer approximations of a particular vehicle's value.

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[5] "Average" refers to a "hypothetical 'average' car in 'average' condition." J.A. 75.

[6] Maclean Hunter also publishes *Older Car/Truck Red Book — Official Used Car Valuations* ("Older Red Book"). The Older Red Book, which is published quarterly, projects opinions of value for "average" domestic and imported cars and light trucks that are from eight to eighteen years old. J.A. 117; J.A. 632.

[7] The Red Book contains a mileage chart (Resp. App. 6a) and an option valuation chart for cars and light trucks. Resp. App. 7a. The mileage chart reflects the judgment of the Red Book editors as to the increased value a car may have with low mileage and the decreased value a car may have with high mileage. The option valuation charts estimate the value added to vehicles featuring itemized options such as power windows or cruise control.

Petitioner CCC has engaged in systematic copying of the retail and wholesale valuations published in the Red Book and the selection and arrangement of these valuations and has loaded this material directly into a computer database for use with various services provided by CCC. J.A. 435-438; J.A. 511-513; J.A. 526- 527; J.A. 550.[8] Simply put, CCC "literally tear[s] the [Red B]ook apart by the different [automobile] makes" and enters the information into its database. J.A. 513.[9]

The District Court found that CCC's wholesale copying of "the Red Book's valuation data is undisputed" (Pet. App. 47a), that "CCC subscribes to ... and openly admits its use of Red Book valuations" (Pet. App. 47a) and that "CCC inputs Red Book's retail, wholesale, option and mileage valuations into its computer database of VVS reports...." Pet. App. 58a. The Second Circuit confirmed this conclusion, stating that "[s]ince at least 1988, CCC has itself been systematically loading major portions of the Red Book onto its computer network and republishing Red Book information in various forms to its customers." Pet. App. 4a-5a. CCC copies not only the used car valuations projected by Red Book editors, but also copies the selection and arrangement of the material presented in the Red Book. Pet. App. 4a-5a, 27a-28a.

While the Red Book is approved for use in Connecticut, New Jersey, New York, and Pennsylvania, none of these states requires that the Red Book be used for assessing a car's value

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[8] In 1981, CCC sought a license from Maclean Hunter's predecessor to use Red Book valuations. J.A. 18. In 1982 and thereafter, CCC unsuccessfully sought a license for authorized use of Red Book's valuations. J.A. 19-48. In 1984, CCC wrote to Maclean Hunter to inform Maclean Hunter that it was being "ripped off" because another computer averaging service was using Red Book's figures. J.A. 68-70.

[9] CCC also copies the high and low retail valuations and option valuations and selections from the Older Red Book for use in connection with its services. J.A. 161-162.

for insurance purposes.[10] These statutes and regulations are directed to insurers and offer them several alternatives for arriving at fair valuations of used vehicles. N.J. Admin. Code § 11:3-10.4 (1988) (permits settlements based upon quotations obtained from local dealers for substantially similar motor vehicles regardless of Red Book values) (Pet. App. 71a-72a); N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7(c) (same) (Pet. App. 73a-75a); and 31 Pa. Code § 62.3(f)(2) (1984) (same) (Pet. App. 75a-77a). Connecticut approves the use of different valuation services, including CCC, and, thus, cannot be characterized as requiring the use of the Red Book. Conn. Ins. Dept. Bull. No. IC-10 (Dec. 10, 1992). Resp. App. 4a-5a. *Compare* Pet. 5.

B. *Procedural Background.* On March 19, 1991, CCC filed a complaint for, *inter alia*, a declaratory judgment pursuant to 28 U.S.C. §§ 1338(a)(b), 1367(a) that no copyrightable material had been taken from Maclean Hunter. Maclean Hunter answered and counterclaimed, under 17 U.S.C. § 501, asserting the validity of its copyrights and infringement thereof.

Following the submission of motions for summary judgment by both parties, Magistrate Judge Arthur Latimer issued a recommended ruling which was adopted by the District Court for the District of Connecticut on June 8, 1993. Pet. App. 65a. In addition to the elements of the recommended ruling that CCC found favorable and described in its petition (Pet. 8-9), the magistrate judge ruled against CCC on its affirmative defenses of fair use, invalid registration, unenforceable copyright, waiver, estoppel, laches, release, statute of limitations and *res judicata*. Pet. App. 45a-63a.

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[10] CCC crafts its second question for review as though the Red Book is "required to be used by" state laws (Pet. i) and, similarly, mischaracterizes the laws of these four states in its Factual Background (Pet. 5) and its Argument. Pet. 27.

On appeal by Maclean Hunter, the Second Circuit found that the district court had erred in ruling that the Red Book valuations command no copyright protection by reason of lack of originality. Pet. App. 15a. First, the Second Circuit determined that "[t]he valuations themselves are original creations of Maclean" (Pet. App. 13a), reasoning that the district court was "simply mistaken in its conclusion that the Red Book valuations were, like the telephone numbers in *Feist*,[11] pre-existing facts that had merely been discovered by the Red Book editors." Pet. App. 12a. Instead, the court found that the Red Book valuations were based on the professional judgment and expertise of the editors. Pet. App. 4a, 13a.

In addition, the Second Circuit found that "the *selection and arrangement* of data in the Red Book displayed *amply* sufficient originality to pass the low threshold requirement to earn copyright protection." Pet. App. 14a (emphasis added). The Second Circuit identified, *inter alia*, the following aspects of the Red Book as constituting original expression:

> (1) the selection and manner of presentation of optional features for inclusion; (2) the adjustment for mileage by 5,000 mile increments (as opposed to using some other breakpoint and interval); (3) the use of the abstract concept of the "average" vehicle in each category as the subject of the valuation; and (4) the selection of the number of years' models to be included in the compilation.

Pet. App. 14-15a (footnote omitted).

The Second Circuit further determined that the district court erred in applying the "merger doctrine" to bar copyright protection of the Red Book. According to the Second Circuit, the district court incorrectly found that "each entry in the Red

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[11] *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc*, 499 U.S. 340 (1991).

Book is an idea — the idea of the value of the particular vehicle — and that idea is necessarily communicated by a dollar figure." Pet. App. 6a. Instead, the court of appeals ruled that the idea of valuing used vehicles and the Red Book editors' expressions of the value of "average" used vehicles were separable (Pet. App. 20a-30a), that Maclean Hunter sought no monopoly over the idea of valuing used vehicles (Pet. App. 28a) and that "[o]thers, including CCC, remain free to value used cars and to profit from their valuations." Pet. App. 30a, n.28.

Finally, the Second Circuit rejected as unsupported the district court's finding that the Red Book had fallen into the public domain. Pet. App. 30a-31a. The Second Circuit concluded that a state's reference to a copyrighted work as a standard for valuing vehicles should not result in the loss of the copyright. Pet. App. 31a.

REASONS FOR DENYING THE WRIT

The court of appeals properly decided to withhold application of the "merger doctrine" and the "public domain" doctrine. Further review is unwarranted because the rulings of the court below neither extend existing copyright law nor conflict with decisions of this Court or any other courts of appeals.

I. The Court's Copyright Protection of Red Book Valuations Does Not Expand Copyright Law Principles Or Violate First Amendment Interests.

The decision below does not impermissibly impinge upon the free speech of CCC or the public. CCC's petition should be denied because the Second Circuit properly applied both the purpose of the Copyright Act and cases interpreting that Act and fully supported its decision with the facts of the case.

A. CCC Has No First Amendment Right To Copy Original Expression.

CCC argues that the Second Circuit's decision impermissibly withholds certain ideas from public use, in violation of the First Amendment. U.S. Const. amend. I. Pet. 12.

As a preliminary matter, it should be noted that CCC's argument is based on a fundamental mischaracterization of the court's actions below. The Second Circuit's decision to preserve copyright protection for the Red Book guidebooks does not involve suppression of ideas based on their content. Rather, the decision properly determined that the Red Book valuations, as well as their selection and arrangement, constituted original expressions. Pet. App. 13a, 14a.[12] As such, the court properly held that CCC was not entitled to copy these original expressions under the Copyright Act.[13]

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[12] This ruling notwithstanding, CCC incorrectly persists in its Petition on labeling the Red Book's valuations as facts or data. *See, e.g.*, Pet. i (describing valuations as "data"); Pet. 6 (describing its file as containing only Red Book "price data"); *id.* (characterizing its use as only of Red Book's "numerical data"); Pet. 10 (characterizing Second Circuit as protecting "price data"); Pet. 17, n.10 (describing valuations taken as "facts"); Pet. 19 (criticizing Second Circuit for not taking into account "factual character of the Red Book materials"); *id.* (describing valuations as "price data").

The opinion below clearly held that the Red Book is not a compendium of pre-existing facts (Pet. 12a), and CCC has not presented this question for this Court's review. Accordingly, the court should ignore CCC's attempt to resurrect this issue.

[13] Under 17 U.S.C. § 102, the Copyright Act affords protection to, *inter alia*, original "literary works," which include "works, other than audiovisual works, expressed in words, *numbers*, or other verbal or *numerical symbols* or indicia[.]" 17 U.S.C. § 101 (emphasis added).

By affording protection to original expression, the Act necessarily restricts others from using these expressions without permission of the copyright owner. Thus, the Act establishes "a delicate equilibrium" between preserving the "incentive to create" and "limit[ing] the extent of that protection so as to avoid the effects of monopolistic stagnation." *Computer*

The Second Circuit's decision to protect original expression is in accord with the Copyright Act and clearly not in violation of the First Amendment. As the opinion below stated:

> [t]here can be no First Amendment justification for the copying of expression along with the idea simply because the copier lacks either the will or the time or energy to create his own independently evolved expression. The First Amendment ... does not offer a governmental subsidy [. . .] at the expense of authors whose well-being is also a matter of public interest.

Pet. App. 29a, n.27, *quoting* 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 1.10[D] at 1-98 to -98.1 (1994) ("*Nimmer*").

Thus, while there is a First Amendment right to obtain and copy facts and underlying ideas, the First Amendment does not provide a right for a competitor to use the original expressions of authors, such as Maclean Hunter. CCC contorts principles of copyright law in arguing that withholding Red Book's valuations from the public violates the First Amendment.

B. The Court's Decision To Withhold The Merger Doctrine Is Consistent With Copyright Law and First Amendment Principles.

CCC specifically argues that the Second Circuit's merger doctrine analysis is based on an invalid content-based determination. Again, CCC's argument ignores the Second Circuit's finding that the Red Book valuations were original expressions. In deciding to withhold the merger doctrine, the Second Circuit properly found that protecting Maclean Hunter's original ex-

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Associates Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 696 (2nd Cir. 1992). *See also Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985) ("[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression ... [b]y establishing a marketable right to the use of one's expression...").

pressions removed no ideas from the public realm. Pet. App. 26a-30a. As explained below, this decision is consistent with the merger doctrine and its precedent, as well as with the First Amendment.

Under the merger doctrine, "expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself." *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991) (footnote omitted); *see also Baker v. Selden*, 101 U.S. 99 (1879). In such situations, the expression is said to have "merged" with the idea, and thus is uncopyrightable. *Id.*

In deciding whether to apply the merger doctrine, the central question is whether there is a risk of withholding an idea from the public realm if its expression is copyrighted. 3 *Nimmer*, § 13.03[B] at 13-75. *See also Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) (describing the question as whether protecting expression "would confer a monopoly of the 'idea' upon the copyright owner. . . .").

Courts have undertaken such an analysis by using the "abstractions test" to determine the separability of the idea from its expression. In an oft-cited decision (about the originality of a play), Judge Learned Hand explained that the more abstract the idea, the less likely its expression will merge with the underlying idea. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could pre-

> vent the use of his "ideas," to which, apart from their expression, his property is never extended.

Pet. App. 19a-20a, *quoting Nichols*, 45 F.2d at 121. Thus, while copying the text of a play would clearly violate its copyright, closely imitating the general plot line would not. 45 F.2d at 121.[14]

The court below appropriately applied such an analysis and concluded that there was little risk that protecting the Red Book valuations would extend to Maclean Hunter a monopoly over all valuations of used vehicles. To the contrary, the court found the idea of valuing used cars to be sufficiently abstract so that any number of specific expressions of value were possible. "Others, including CCC, remain free to value used cars and to profit from their valuations." Pet. App. 30a, n.28. Thus, the court's decision to withhold the merger doctrine was appropriate and in line with precedent applying the "abstractions test."

The court below also declined to apply the merger doctrine on the grounds that the Red Book editors' valuations were subjective predictions of future prices rather than "reports of historical prices" or "mechanical derivations of . . . prices or other data." Pet. App. 12a-13a. The court's decision to preserve copyright protection for expressions of opinion and predictive analysis (what the court below has termed "soft ideas") is not a new, impermissible content-based determination, as CCC contends (Pet. 12), but follows copyright principles and precedent.

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[14] *See also Kregos*, 937 F.2d at 707 (finding that "'idea' for purposes of the merger doctrine, remains the general idea that statistics can be used to assess pitching performance," which did not merge with the expression of the particular pitching form used to organize the statistics); *Educational Testing Services v. Katzman*, 793 F.2d 533, 540 (3d Cir. 1986) (refusing to apply the merger doctrine to test questions on grounds that the test questions did not represent the only means of expressing the ideas and that anyone "using its own resources" could "devise questions designed to test these concepts.").

Courts have extended copyright protection to original valuations or analyses on the basis that protection of these expressions would not bar access to underlying information or data. In *Wainwright Sec. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied* 434 U.S. 1014 (1978), for example, the court enjoined the publication of summaries of analytical research and financial predictions because it appropriated "almost verbatim the most creative and original aspects of the report. . . ." The court distinguished this type of appropriation from "legitimate coverage of a news event" which would have fairly used only the facts or ideas reported. *Id. See also Marshall & Swift v. BS & A Software*, 871 F. Supp. 952, 962 (W.D. Mich. 1994) (enjoining copying of tables of cost estimations on basis that they were expressions of opinion and not statements of fact).

Expressions of opinion or analysis are distinguishable from discoveries of fact or interpretations of a historical event, where preserving the copyright might prevent dissemination and further analyses of those facts. *See, e.g., Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980) (finding historical interpretation of Hindenburg unprotected); *Gates Rubber Co. v. Bando Chemical Indus., Ltd.*, 9 F.3d 823 (10th Cir. 1993) (denying protection to "constants" used in a computer program because they were deemed to be pre-existing facts).[15]

With respect to Red Books' valuations, the court below properly concluded that copyrighting the Red Book editors' subjective expressions would not deny the public access to the

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[15] CCC relies on *Gates* to suggest that the question of valuation is one of recurring significance. Pet. 11. It should be clear, however, that there is no conflict between *Gates* and the opinion below. *Gates* does not concern the "opinion" of an engineer (as CCC states), but the "scientific observation" of fact. 9 F.3d at 842. As the court in *Marshall & Swift* explained, the type of non-protectable analysis of fact in *Gates* distinguishes it from cases involving expressions of opinion. 871 F. Supp. at 962.

information underlying their analyses. The court recognized correctly that only the opinions of Red Book editors were copyrighted, not the idea of valuation or any economic tools that might exist for the public — or CCC for that matter — to analyze the car market on its own. Pet. App. 29a-30a. Accordingly, the court fulfilled the purpose of the Copyright Act in protecting original expression while preserving the free dissemination of ideas and the right to research those ideas and express original opinions on the subject.

C. The Court's Decision Does Not Confer A Statutory Monopoly Over Ideas.

The opinion below did not create a statutory monopoly over the idea of valuing used vehicles.[16] Rather, the court commented that:

> Maclean Hunter makes no attempt, for example, to monopolize the basis of its economic forecasting or the factors that it weighs; the Red Book's entries are no more than predictions of Red Book editors of used car values for six weeks on a rough regional basis. As noted above, Red Book specifies in its introduction that "[y]ou, the subscriber, must be the final judge of the actual value of a particular vehicle."

Pet. App. 28a-29a, *quoting* the Red Book.

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[16] CCC does not identify what "idea" the court of appeals has taken from the public domain in the statutory monopoly section of its brief. Pet. 19-26. CCC appears, on the one hand, concerned that a monopoly should not exist over pre-existing facts (*see, e.g.*, Pet. 19, 21, 23, 24) and, on the other hand, concerned that opinions should not be monopolized. *See, e.g.*, Pet. 23-25. In any event, Respondent Maclean Hunter presumes CCC was concerned that the opinion below has created a monopoly over the idea of valuing vehicles since that is the only real "idea" at issue. As discussed in note 12, *infra*, CCC has failed to raise, as an issue presented here, whether or not the court below properly decided that the valuations were opinions instead of facts.

Maclean Hunter seeks only to create a "monopoly" over its own valuations, deemed "original creations" by the court below (Pet. App. 13a). Preserving copyright protection for these valuations, as well as for the selection and arrangement of the Red Book, is consistent with the Copyright Act's intent to preserve the incentive to create (*see* note 13, *infra*). Such protection does not impede the progress of science and the arts, but promotes these goals.

As the court below explicitly stated, CCC is still free to value vehicles itself. Pet. App. 30a, n.28. CCC, however, does not want to use the non-protected raw data (*e.g.*, factual information regarding makes and models of used cars) in order to derive its own valuation. Pet. 23a-24a. Instead, CCC seeks to use and sell the original valuations created by Red Book editors in CCC's own published products, in essence marketing the equivalent of a Maclean Hunter derivative work without authorization.[17] In this regard, CCC is not looking for simply a "free hand to build upon the [factual] work of [its] predecessors," *Hoehling*, 618 F.2d at 980; CCC is looking for a free handout. CCC wants to engage in wholesale copying of the original valuations created by Red Book editors.[18] Since the issue of whether or not these valuations were original was decided by the court below, and since CCC has not properly appealed the Second Circuit's determination of originality of these valuations, it cannot now disguise its objections to the finding of originality behind a statutory monopoly framework.

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[17] Only Maclean Hunter has the exclusive right to prepare derivative works based upon its original expressions. 17 U.S.C. §§ 101, 106(2).

[18] CCC suggests that, because courts have granted public use of factual compilations which are "formed by an author's opinion or judgment" (Pet. 24, citing *Hoehling* and *Gates* among other cases), CCC should also have access to the Red Book valuations. The holdings in *Hoehling* and *Gates* are not relevant to the present situation, however. As explained in Section Ib, *infra*, those cases concerned non-protectable interpretations and compilations of pre-existing facts. The Red Book valuations, on the other hand, contain original, subjective expressions which are legitimately copyrighted.

II. The Time At Which A Court Applies The Merger Analysis Has No Impact On This Case.

Despite CCC's arguments to the contrary, the issue of *when* to apply the merger doctrine is not relevant to this case. The court below noted that, in the Second Circuit, "consideration of the merger doctrine takes place in light of the alleged copying to determine if the infringement has occurred, rather than in analyzing the copyrightability of the original work."[19] CCC argues that applying a merger analysis at the later, infringement stage distorts the analysis because courts look at *both* non-protected and protected materials when analyzing whether the expression and idea merge. Pet. 15-16.

Any conflict among the circuits is not relevant to this case, however, because the court of appeals examined only protected materials when it conducted its merger analysis. The court was not, as CCC contends (Pet. 13), "influenced by factors which have no relation to the protectability of the [Red Book]."[20] The court compiled a laundry list of the many aspects of the Red Book that constituted original expression (*e.g.*, vehicle valu-

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[19] Courts either apply the merger doctrine 1) when determining whether the material merits copyright protection or 2) when determining whether infringement has occurred. *See Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 138, n.5 (5th Cir. 1992). The court below commented that "[a]ssessing merger in the context of alleged infringement will normally provide a more detailed and realistic basis for evaluating the claim that protection of expression would inevitably accord protection to an idea." Pet. App. 28a, *quoting Kregos*, 937 F.2d at 705.

[20] Remarkably, CCC's primary support for this point is that the court of appeals looked beyond the protectable elements of selection and arrangement in the Red Book and also looked at the "*facts* contained in the compendium." Pet. 17, n.10 (emphasis added). CCC's concern is completely unfounded, however, since the valuations contained in the charts constitute protectable expression as much as the selectivity and arrangement involved. Thus, in looking at the valuations, the court of appeals did not look beyond protected expression.

ations, mileage adjustments), thereby separating protected expression from non-protected expression (*e.g.*, names of cars or models). Pet. App. 12a-15a. The court below then properly compared the protected original expressions with the materials systematically copied by CCC and concluded that the merger doctrine should be withheld. *See* Section I.B., *infra.*

CCC's attempt to describe a real conflict among circuits concerning when to apply the merger doctrine is, once again, an attempt to resurrect its contention that it only copied facts. For example, in criticizing the Second Circuit's approach toward the merger doctrine, CCC states that:

> [t]he difference in this approach becomes apparent in dealing with *minimally expressed, factual compilations* where a significant portion of the work comprises data which are not eligible for copyright protection.

Pet. 16-17 (emphasis added). CCC here mischaracterizes the valuations as facts rather than original, non-factual opinions, ignoring the Second Circuit's holding. CCC should not be permitted to use an alleged conflict among the circuits — which bears no relevance to this case — as a springboard for seeking review for an argument it has not properly raised on appeal.

III. Reference To The Red Book In Public Statutes Does Not Remove Copyright Protection.

The opinion below correctly held that by being referenced in various statutes and regulations, the Red Book has *not* fallen into the public domain and, thereby, lost its copyright protection. Pet. App. 31a. No authority that CCC cites supports the position that copyright protection vanishes merely because a publication is referenced in a public law. Pet. 26-29.

Moreover, CCC again seeks to manufacture a non-existent conflict among circuits on this issue. Pet. 27-28. Only one

court of appeals decision has reached this issue: the Second Circuit's opinion in this case. The First Circuit's decision in *Building Officials & Code Adm. v. Code Technology, Inc.*, 628 F.2d 730 (1st Cir. 1980) ("BOCA"), discussed but did not apply the "public domain" doctrine as a holding to the facts of that case. As the court below points out:

> [a]lthough the First Circuit Court of Appeals, in *BOCA*, expressed sympathy with the arguments here advanced by CCC, its ruling is not a holding to that effect. The Court of Appeals merely vacated a preliminary injunction, expressing doubts as to the plaintiff copyright holder's likelihood of success, and remanding for a full hearing on whether the plaintiff had lost its copyright protection by reason of the adoption of its previously protected work (a construction code) as part of the laws of Massachusetts.

Pet. App. 31a.[21]

Not only was the *BOCA* decision merely a preliminary ruling, but it also addressed a set of facts clearly distinguishable from this case. None of the four states (Connecticut, New Jersey, New York, and Pennsylvania) has literally incorporated the text of any issue of the Red Book into its written statutes, as Massachusetts did when it adopted and distributed BOCA's code (known as the *Commonwealth of Massachusetts State Building Code, 3rd Ed*). 628 F.2d at 732. As stated earlier, these four states reference the Red Book as a valuation source that can be used as one of several valuation methods. *See* Factual Background, pp.4-5 *infra*.

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[21] On remand, the defendants in the *BOCA* case moved to dismiss the case on the basis that the First Circuit had indicated that adopting the building code as a state regulatory scheme placed the code in the public domain. The district court denied the motion to dismiss stating that, as the First Circuit had expressed, a full hearing was necessary to decide the issue. *Building Officials & Code Adms. Int'l Inc. v. Code Technology Inc.*, 210 U.S.P.Q. 289 (D. Mass. 1980). No further opinion is reported.

Other than *BOCA*, CCC's only support for its public domain argument is *NADA Servs. Corp. v. CCC Information Servs. Inc.*, No. 91 C 4593, 1991 WL 287961 (N.D. Ill., Nov. 15, 1991) ("NADA"). Pet. 29. In *NADA*, the court did not decide the merits of the copyright misuse claim; the court merely denied NADA's motion for preliminary injunction.[22] The *NADA* case has since settled with no final judgment by that court on the merits.

Based on its analysis of *BOCA*, *NADA*, and other cases, the court below tersely concluded that "[n]o authority cited by CCC directly supports the district court's view" that the Red Book had fallen into the public domain. Pet. App. 31a.

In contrast with the absence of supporting authority for CCC's argument, several cases support the court of appeal's finding that the Red Book did not fall into the public domain, and, therefore, did not lose its copyright protection. In *Practice Management Information Corp. v. American Medical Ass'n*, 877 F. Supp. 1386 (C.D. Cal. 1994), for example, the court upheld copyright protection for privately developed reference codes that a federal agency required physicians to use when submitting claims for reimbursement. *See also Rocky Mountain Motor Tariff Bureau v. G.R. Leonard & Co.*, 652 F. Supp. 1473, 1475 (D. Colo. 1987) (tariff guidebook was not "uncopyrightable simply because it has been filed with the ICC and published in accordance with federal law.").[23]

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[22] The *NADA* decision relied exclusively on the First Circuit's decision in *BOCA*. *NADA*, 1991 WL at *3.

[23] Further support for the court of appeal's decision can be found in *Del Madera Properties v. Rhodes and Gardner, Inc.*, 637 F. Supp. 262 (N.D. Cal. 1985), *aff'd*, 820 F.2d 973 (9th Cir. 1987) and *Rand McNally & Co. v. Fleet Management Sys. Inc*, 591 F. Supp. 726 (N.D. Ill. 1983). In *Del Madera Properties*, the court conferred copyright protection to a privately-created map that was later adopted by a city council as its zoning plan. 637 F. Supp. at 264. In *Rand McNally*, the court held that the "public domain" doctrine did not extend to a privately created mileage guide that was filed

Furthermore, as a matter of policy, if copyright protection vanished every time a state referenced an article, textbook, code, or guidebook, copyright protection would be meaningless. Authors and publishers would avoid producing material that might be of potential use to state, local, or federal governments.[24] Contrary to the intention of copyright protection, publishers would have no economic incentive to create and disseminate ideas useful to the public interest. *Harper & Row*, at 558; *Practice Management*, 877 F. Supp. at 1392-93 ("[p]rivate industry would have no incentive to spend enormous sums on research and development knowing that the government could at any time incorporate such work).[25]

Moreover, the issue here is not whether there is a denial of public access, in violation of due process (Pet. 28); rather, the issue is whether CCC can appropriate the Red Book for commercial use for profit.[26] According to Nimmer, commercial use by a publisher's competitor does not abrogate copyright protection where reference to a copyrighted work in a statute has

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with the government; copyright protection of the map was not lost simply because the guide was relied upon, by government regulation, as one source of factual data. 591 F. Supp. 734-736. Although CCC attempts to distinguish these cases (Pet. 28, n.16), it does so on the mistaken belief that the four states at issue here mandate the incorporation of the Red Book into the law.

[24] In addition, if the Court determined that a state's reference to the Red Book thrust the valuations into the public domain, the Court would be sanctioning a governmental taking without compensation, in violation of the Fifth and the Fourteenth Amendments of the Constitution, *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983), and the result of the Court's action would be contrary to the principles of the Supremacy Clause. *See also Practice Management*, 877 F. Supp. at 1393.

[25] Even CCC's copyrighted computer valuation reports database, which is referenced in Connecticut's laws (Resp. App. 4a-5a), would lose protection under its theory.

[26] The magistrate judge specifically rejected CCC's fair use defense (Pet. App. 56a-59a, 63a); CCC's "public domain" or public access arguments are a reformulation of this defense.

occurred. 1 *Nimmer*, § 5.06[C] at 5-60 (footnote omitted.) While Nimmer argues that the adoption of a private work into law might well justify a fair use defense for personal use, Nimmer doubts

> whether [the adoption] should also immunize from copyright liability a competitive commercial publisher, as in [*BOCA*], at least where the copyright owner of the code, or its licensee, has published and adequately disseminated authorized copies of the code. To vitiate copyright in such circumstances could, without adequate justification, prove destructive of the copyright interest in encouraging creativity in connection with the increasing trend toward state and federal adoption of model codes.

Id.

Here, the Red Book has been published and adequately disseminated; in fact, the guidebooks are easily available to insurance companies and to consumers by subscription and in public libraries. Maclean Hunter has not limited the distribution of the Red Book to any end-user, only to competitors republishing its materials for profit. CCC should not be permitted to manipulate the public domain doctrine for its pecuniary gain.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: July 7, 1995

FEDERAL STATUTES

United States Copyright Act of 1976, 17 U.S.C. §§ 101 - 1101.

17 U.S.C. § 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

17 U.S.C. § 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 106. Exclusive rights in copyrighted works

Subject to sections 107 through 120, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

STATE OF CONNECTICUT

INSURANCE DEPARTMENT

Bulletin No. IC-10
December 10, 1992

TO: COMPANIES LICENSED IN CONNECTICUT TO WRITE AUTOMOBILE LIABILITY AND/OR AUTOMOBILE PHYSICAL DAMAGE INSURANCE

RE: SECTION 38a - 353 (PUBLIC ACT 87-158) CALCULATING THE VALUE OF TOTALLED MOTOR VEHICLES

This Bulletin supplements Bulletin No. IC-4 dated August 28, 1987, Bulletin IC-5 dated October 27, 1987, and Bulletin No. IC-9 dated June 26, 1992.

Sec. 38a-353 of the Connecticut General Statutes requires that whenever any damaged motor vehicle covered under an automobile insurance policy has been declared to be a constructive total loss by the insurer, the insurer shall, in calculating the value of such vehicle for purposes of determining the settlement amount to be paid to the claimant, use at least the average of the retail values given such vehicle by (1) The National Automobile Dealers Association Used Car Guide and (2) one other automobile industry source which has been approved for such use by the Insurance Commissioner.

Pursuant to the authority of this Statute, the National Markets Reports Inc., Red Book Region A ("Red Book"), the Automatic Data Processing Autotrak Valuation Service for Connecticut local market conditions ("Autotrak"), and the Local Market Valuation Service of CCC Information Services Inc. ("CCC") are hereby approved as second sources for calculating the value of a damaged motor vehicle declared to be a constructive total

loss. The terms and conditions of the above described Bulletins remain in full force.

The Director of the Consumer Affairs Division, however, is hereby directed to maintain a list of those companies that are approved by the Insurance Department as second sources, and to accept and review applications of other valuation service companies that desire to be added to this approved list. Therefore, in the future, insurers will not be notified by bulletin of additional approvals, but will be required to determine the approval of the other second sources by contacting the Consumer Affairs Division of the Insurance Department.

Insurers are further reminded of the prohibition against "source shopping" as detailed in Bulletin No. IC-9.

Robert R. Googins
Insurance Commissioner

MILEAGE CHART

	0 5000	5001 10000	10001 15000	15001 20000	20001 25000	25001 30000	30001 35000	35001 40000	40001 45000	45001 50000	50001 55000	55001 60000	60001 65000	65001 70000	70001 75000	75001 80000	80001 85000	85001 90000	90001 UP
SCHEDULE (1)																			
1990	400	275	0	275	425	550	700	850	1000	1150	1300	1450	1600	1750	1900	2050	2175	2250	2350
1989	575	450	325	75	0	250	375	525	675	825	975	1125	1275	1425	1575	1725	1850	1950	2025
1988	725	600	175	375	300	50	0	200	350	500	650	800	950	1100	1250	1400	1525	1650	1700
1987	825	700	75	475	400	325	75	50	0	175	325	475	625	775	925	1075	1200	1300	1375
1986	925	800	100	600	500	425	350	300	75	25	0	150	300	450	600	750	875	975	1050
1985	1000	900	775	700	600	525	450	400	325	300	75	50	25	0	275	400	550	650	725
1984	1050	950	850	750	675	600	525	475	400	350	300	275	75	50	25	0	200	300	400

ADD DEDUCT

M=1

M=2

M=3

M=4

SCHEDULE (2)																			
1990	425	300	0	300	450	600	775	925	1100	1250	1425	1575	1750	1900	2050	2200	2350	2450	2550
1989	600	475	350	275	0	250	400	575	750	900	1050	1225	1375	1550	1700	1850	2000	2100	2200
1988	775	650	200	400	300	75	0	225	375	550	700	875	1025	1200	1350	1500	1650	1750	1850
1987	925	775	50	525	425	350	275	50	0	200	350	500	675	825	975	1150	1300	1400	1475
1986	1025	875	750	625	525	450	375	300	75	50	0	150	325	475	650	800	950	1050	1125
1985	1100	975	850	750	650	575	500	425	350	300	275	50	25	0	300	450	550	625	775
1984	1150	1025	925	825	725	650	575	500	425	375	325	275	75	50	25	0	250	350	425

ADD DEDUCT

SCHEDULE (3)																			
1990	450	325	0	325	500	700	875	1050	1225	1425	1600	1800	1975	2150	2350	2525	2700	2800	2900
1989	625	500	375	275	0	250	475	650	850	1025	1200	1400	1575	1750	1950	2125	2300	2400	2500
1988	800	675	225	400	325	75	0	225	400	625	800	1000	1175	1350	1550	1725	1900	2000	2100
1987	975	825	75	550	450	350	275	50	0	225	400	600	775	950	1150	1325	1500	1600	1700
1986	1100	950	800	675	575	475	400	325	275	50	0	175	375	550	750	925	1100	1200	1275
1985	1200	1075	925	825	700	625	525	450	375	325	275	50	25	0	325	500	675	775	875
1984	1275	1125	1000	875	775	700	600	525	450	400	350	275	75	50	25	0	300	400	500

ADD DEDUCT

SCHEDULE (4)																			
1990	500	375	0	375	550	750	925	1100	1275	1475	1650	1850	2025	2200	2400	2575	2750	2850	2950
1989	675	550	425	275	0	250	525	700	900	1075	1250	1450	1625	1800	2000	2175	2350	2450	2550
1988	850	725	275	450	375	75	0	225	450	675	850	1050	1225	1400	1600	1775	1950	2050	2150
1987	1025	875	75	600	500	400	325	50	0	250	450	650	825	1000	1200	1375	1550	1650	1750
1986	1150	1000	850	725	625	525	450	375	325	50	0	200	400	575	775	950	1125	1225	1300
1985	1275	1125	1000	875	775	700	600	525	475	400	325	275	75	50	25	0	325	425	525
1984	1350	1225	1075	975	875	775	700	625	550	475	425	350	275	75	50	25	0	325	425

ADD DEDUCT

DO NOT USE THIS CHART UNTIL YOU HAVE READ THE INSTRUCTIONS ON THE PRECEDING PAGE.
SEE INDIVIDUAL LISTINGS FOR OPTION & MILEAGE CLASSIFICATIONS. FOR LT. TRUCKS (NON COMMERCIAL) USE M = 3.
MAXIMUM ADDITION OR DEDUCTION SHOULD NOT EXCEED 50% OF THE PUBLISHED WHOLESALE VALUE.

1/1/91

LIGHT DUTY TRUCKS

DOMESTIC & IMPORT
OPTION VALUATION CHART

OPTION ADD FOR	Avg. '90 List Price	90	89	88	87	86	85 thru 84
AM-FM	169	100	75	50	50	25	25
Add Stereo	79	75	75	50	50	25	25
Add Tape.	158	75	75	50	50	25	25
Add Equal./Prem. System	561	300	200	150	100	75	NA
Add Elect. Tune	153	75	75	50	50	25	N/C
Auto. Trans.	576	375	325	275	250	225	175
Auto. Trans. W/O.D.	740	475	425	350	300	250	200
Power Door Locks	191	100	100	75	50	50	25
Power Windows	270	150	125	75	50	50	25
Tilt Wheel	128	100	75	50	50	50	25
Cruise Control	212	100	100	75	50	50	25
Electric Seat (6 way)	252	150	100	75	50	25	25
Leather Seats	812	475	400	350	275	175	50
Rear Step Bumper	165	75	50	50	25	25	N/C
Dual Wheel Pkg. (1 Ton)	710	500	400	350	300	250	200
Sliding Rear Window	126	75	75	50	50	25	N/C
Electric Defogger	161	100	75	50	50	25	N/C
Deep Tinted Glass	362	300	225	150	100	75	50
Alum/Custom Wheels	300	200	175	100	75	50	25
32 gal and up Fuel Capacity	187	125	100	100	100	100	50
Complete Snowplow	1700	1000	800	550	450	450	300
A/C ★ T=1	824	600	500	375	300	225	175
A/C • T=3, T=2	984	650	575	475	400	325	225
Dual A/C ☐ T=3	1293	825	725	600	525	450	300
Dual A/C ■ T=2	1600	925	825	700	625	550	400
7 & 8 Pass. ☐ ■ T=3, T=2	316	200	175	150	100	100	100
12 Pass. ■ T=2	661	400	325	300	200	200	175
15 Pass. ■ T=2	982	500	425	375	275	250	200
4 Wheel Anti Lock Brakes	1160	500	400	NA	NA	NA	NA
"X" code trucks are valued with the following equipment; 4 or 5 speed manual, power steering & power brakes. Deduct if not so equipped.							
With 3 Speed Manual	Std.	350	325	300	275	250	175
Without Power Steering	Std.	325	275	225	175	150	125
Without Power Brakes	Std.	150	100	100	75	50	N/C
★ Pickup, Chassis Cabs and all others T=1 ■ Vans T=2			☐ Suburban T=3 • Suburbans and Vans T=3, T=2				

8/12/15 Passenger Value for 8/12/15 Passenger when not shown as specific model.

(For Light Truck (non commercial) use M=3 mileage chart)

M = 9 *Do Not Use Chart* (Commercial Vehicle)

Average Retail Prices Shown: Wholesale and Finance is 85% of Retail.